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SECURITIES DIVISION
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October 2, 2003

VIA FACSIMILE AND U.S. MAIL

Mr. Wade L. Nash, Esq.
Missouri Bankers Association
207 E. Capitol Avenue
P.O. Box 57
Jefferson City, MO 65102

Re: Bank Personnel Excluded from the Definition of Investment Adviser and
Investment Adviser Representative under the Missouri Securities Act of 2003;
Interpretive Opinion – File No. 2003-01042; IO-14-03

Dear Mr. Nash:

In your letter of September 17, 2003, you requested that the commissioner of securities provide an interpretive opinion in regard to the following issues: (1) whether traditional loan participations between banks would constitute an offer or sale of securities under the Missouri Securities Act of 2003 (the "Missouri Securities Act"); and (2) whether bank personnel are excluded from the definition of investment adviser and investment adviser representative under the Missouri Securities Act (collectively, the "Request"). The commissioner of securities addressed the first issue regarding loan participations in a separate letter. The commissioner will address only the second issue in this letter. Note that the following interpretive opinion of the commissioner is authorized by §409.6-605(d) of the Missouri Securities Act.

In the Request, you refer to the definition of "investment adviser" under section 409.1-102(15)(F) of the Missouri Securities Act, which specifically excludes a bank from the definition. However, as noted in the Request, neither the definition of "investment adviser" nor "investment adviser representative," §409.1-102(16), excludes bank personnel from definition under the Missouri Securities Act.

The commissioner is of the opinion that bank personnel are excluded from the definition of investment adviser under the Missouri Securities Act, unless these persons receive compensation for engaging in the business of advising others as to the value of securities or for other activities as further defined under the definition of investment adviser under §409.1-102(15). The analysis of whether bank personnel are receiving compensation under the definition of investment adviser is similar to the analysis of whether a broker dealer

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and it agents are acting as an investment adviser under §409.1-102(15)(C). If bank personnel receive “special compensation” for providing investment advice, registration as investment advisers would be required under the Missouri Securities Act.¹ However, as long as bank personnel only provide investment advice that is solely incidental to the conduct of business of the bank and the bank personnel do not receive special compensation for the investment advice, then the bank personnel will not fall within the definition of investment adviser under the Missouri Securities Act.

The commissioner is also of the opinion that bank personnel whose performance of investment advice is solely incidental to acting as a bank employee and who do not receive special compensation for investment advisory services do not fall under the definition of investment adviser representative under §409.1-102(16) of the Missouri Securities Act.² The commissioner also agrees with your analysis that, “Since the bank itself is not an investment adviser, the individual employee is not employed by or associated with an investment adviser and does not fall within the definition.” This analysis is appropriate when considering the relationship of bank personnel with the bank but not when considering the relationship of bank personnel with other entities. In addition, bank personnel will want to ensure that they do not fall within the definition of investment adviser as explained above.

This opinion is based on the facts presented in your correspondence, and should the facts prove to differ from those presented, the opinion of this office may differ.

Sincerely,

Douglas M. Ommen
Commissioner of Securities

¹ For further explanation of “special compensation,” please see official comments no. 15 regarding the definition of investment adviser under section 102(15)(C) of the Uniform Securities Act of 2002.

² Section 409.1-102(16)(B) of the Missouri Securities Act states that, “The term does not include an individual who: (B) Is an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services.”